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STATE FOR EB/TPP/IPE JENNIFER BOGER
STATE PASS USTR FOR JENNIFER CHOE GROVES
USDOC FOR ITA/MAC/OIPR CASSIE PETERS

E.O. 12958:N/A

TAGS: [ECON](#) [ETRD](#) [KIPR](#) [TH](#)
SUBJECT: THAILAND 2008 SPECIAL 301 SUBMISSION

¶11. (SBU) Summary and Recommendation: The elevation of Thailand to Priority Watch List in 2007 sparked some improvement in police enforcement of intellectual property rights in the past year, but such efforts were insufficient to make any noticeable dent in the availability of pirated and counterfeit merchandise in Thailand. Thailand continues to be a source of and destination for pirated movies, music, software, and books, counterfeit drugs, apparel, and other counterfeit merchandise. Although industry welcomed the improved police attention to IP enforcement, continuing deficiencies in other enforcement units, the courts and the legal infrastructure served to negate much of the progress in other areas. Post recommends Thailand's continued placement on the Priority Watch List until noticeable improvements can be observed in enforcement efforts and declining piracy rates. End summary.

¶12. (SBU) Last year's decision to place Thailand on the Special 301 Priority Watch List (PWL) was a controversial event in Thailand. Most observers presumed that the decision was based primarily on that year's policy of the Royal Thai Government (RTG) to issue compulsory licenses on three patented pharmaceutical drugs. However, others in and outside the government capitalized on the PWL decision to emphasize the inadequacy of intellectual property protection in Thailand and pushed the need to improve enforcement. At the same time, Thailand became a focus of international anti-IP activists, who counseled the RTG on various IP issues. Elements of the Royal Thai Police and the Department of Intellectual Property launched plans to better coordinate enforcement and crack down on infringers, but their efforts have yet to result in noticeable declines in piracy rates or the availability of pirated merchandise on the streets and in the shops of Thailand. Structural deficiencies within the courts, the police and the legislation that governs IP protection plague enforcement efforts, as does a lack of urgency and will among the government and general public to seriously tackle the problem. Local rights holders have joined international rights holders in demanding stronger enforcement action, staging a series of protests at local police stations over the past few months.

Legal structure improving, but slowly

¶13. (SBU) Thailand has implemented its obligations under the WTO TRIPs Agreement but has not gone substantially further to modernize its laws to keep pace with technological development. Thailand is well behind other similarly situated countries in implementing treaties and international standards needed to encourage the growth of domestic IP-centered industries. Of the 12 significant IP treaties that the U.S. promotes bilaterally, Thailand is a member of only one; ASEAN neighbors Indonesia, the Philippines and Vietnam are each members of six. In January 2008, Thailand started the process to join the Paris Convention and Patent Cooperation Treaty, but the

RTG has not moved forward to implement the Madrid Protocol on trademarks. Thailand is currently considering various pieces of legislation that would amend its patent, trademark, copyright, broadcasting and IP border enforcement laws. For U.S. industry, the most important legislation would be copyright amendments implementing some provisions of the WIPO Copyright Treaties. The Department of Intellectual Property (DIP) is not prioritizing these amendments, instead focusing on creating an unpopular mandatory collective management system, eliminating minimum penalties for copyright infringements, and creating exceptions to copyright law for people with disabilities.

¶4. (SBU) In the patent area, industry believes that Thailand fails to protect pharmaceutical and agricultural test data from unfair commercial use as required by Section 39.3; the RTG reads that section as requiring only trade secret protection for such data. Introductions of generic competitors to pharmaceuticals still under patent are common, and industry bemoans the lack of a patent linkage system that would help them avoid costly litigation. Thailand's handling of conflicting trademarks and geographical indications (GIs) is also problematic, with GIs being given greater weight.

¶5. (SBU) In the final legislative session under the previous government, the National Legislative Assembly passed a new Film Act which would allow for a film quota benefiting local producers, and a new Broadcast Act that cable providers believe will do little to tackle rampant cable piracy.

Enforcement ticks up, but piracy and counterfeiting abound

¶6. (SBU) Inadequate enforcement remains the Achilles heel of IPR protection in Thailand. Rights holders decry a general lack of interest among enforcement authorities in undertaking extensive investigations into pirate networks, or sustained enforcement pressure against retail and wholesale establishments and manufacturers of pirate merchandise. Although police often cooperate effectively with rights holders to carry out raids and seize infringing product, little effort is made to follow up on information obtained during raids to arrest the "big fish" who run the piracy trade. Too often raids end with the seizure of a small amount of product and the arrest of a low-level sales clerk caught with a stack of pirated DVDs. For most pirate operators, absorbing the occasional raid is simply a cost of doing business and has little impact on business. Rights holders also complain that a substantial amount of pirate and counterfeit product disappears from the scene of raids.

¶7. (SBU) The DIP released statistics in February showing seizures of 3,746,036 items of pirated merchandise in 2007, up nearly one-third from 2006. In a meeting with Embassy officers, local rights holders agreed that the number of police raids was higher, but said the quality of raiding had declined. Rights holders say they are struggling with getting police cooperation for larger raids and in obtaining timely search warrants from the courts, and are therefore relegated to carrying out smaller raids on retail areas. Although these thousands of small raids net large amounts of merchandise overall, they do little to dismantle pirate networks.

¶8. (SBU) In early 2007, Police Major General Visut Vanichbut, the new commander of the Royal Thai Police's Economic and Technological Crime Suppression Division (dubbed ECOTEC), lit a fire under police IP enforcement, publicly declaring it his personal mission to remove Thailand from the Priority Watch List. In a number of high profile raids, General Visut led police units to hit pirate optical disc operations that resulted in the seizure of an optical disc production line, hundreds of CD-R burners, and hundreds of thousands of pirated DVDs. ECOTEC officers undertook some of these raids on an ex officio basis, hitting pirate establishments on their own initiative rather than waiting for complaints from rights holders as the police had always done before. Industry reported less product on the street for some time, though the long-term impact appears to have been limited. General Visut also established four mobile enforcement units to tackle piracy outside Bangkok. Unfortunately, ECOTEC has limited manpower and rights holders are not able to depend exclusively on this unit to carry out a large number of investigations and raids.

¶9. (SBU) Gen. Visut's efforts to improve enforcement were warmly welcomed by industry, but his enthusiasm has not been widely shared within the rest of the police force. District police stations and other enforcement authorities are notoriously lax in clamping down on piracy in their areas and accusations are frequently leveled that corrupt officers protect the practice. Rights holders organized several protests against the commander of the police district encompassing many of the so-called "Red Zones" where pirated merchandise is most prevalent. Most investigations are still done primarily by rights holders, who hand over complete evidence to the police or the Department of Special Investigations to conduct a raid. Police may be willing to carry out the requested raids, although rights holders say that they are sometimes turned down. When police do conduct a raid, rights holders generally must pay for the raid. Right holders complain that the price of raids increased significantly in 2007.

¶10. (SBU) Rights holders had high hopes for the Department of Special Investigations (DSI), a unit established in 2002 to investigate large-scale crimes. DSI had been responsible for a number of large IPR cases in 2005 and 2006, but IPR enforcement efforts dropped off in 2007. Rights holders initially praised the DSI commander (recently rotated out) as competent, but said he was short of resources. In addition to some internal squabbling, in 2007 DSI was occupied with a large number of corruption cases and simply did not have the staff or resources to devote to IPR enforcement.

¶11. (SBU) Industry has higher praise for Thai Customs, which continues to cooperate well with rights holders on enforcement and takes frequent ex officio action to seize shipments of pirated merchandise. DIP reported 628 Customs cases in 2007 that resulted in 1,332,319 items seized. Customs officials are diligent on keeping records of seized property and ensuring destruction. The bulk of seizures are from imported shipments. Customs has made seizures from exported shipments, but typically opens containers being exported only if the shipment is highly suspicious. Customs officials have no authority to inspect transshipments or goods in transit, but legislation is in the pipeline to grant that authority.

Notorious Markets

¶12. (SBU) Thai IP authorities have labeled certain areas of Bangkok and other parts of Thailand as "red zones" where infringing product is most readily available. In Bangkok the red zones are Klong Thom, Saphan Lek and Baan Mor shopping areas, Patpong and Silom shopping areas, Mah Boon Krong (MBK) Center, the Sukhumvit Road area (soi 3-19), and perhaps the most notorious, Panthip Plaza, a five-story mall with dozens of pirate stalls selling the latest DVDs and software. In Thailand's second city, Chiang Mai, the Night Market shopping area, Computer Plaza, Icon and Rimkam Market are considered red zones. In the rest of Thailand, red zones include four markets in Songkhla province, and tourist markets in the beach towns of the provinces of Phuket, Surattani, Chonburi and Krabi.

Courts issue few deterrent sentences, and slowly at that

¶13. (SBU) Thailand's Intellectual Property Court, once a model for the region, is not operating to its full potential. Rights holders frequently complain that few offenders of piracy crimes receive sentences more serious than a small fine or community service. DIP reported that 7,118 arrests were made in 2007, but industry says only 15-17 actually received prison sentences (and it is not clear those sentences were actually served). For their part, judges say that police continue to bring up on charges only low-level offenders that the judges feel do not merit harsh punishment, while failing to charge large operators that the courts are ready and willing to try.

The court also complains that many right holders settle cases out of court, and in fact use the court's search warrants to shake down infringers as an alternative source of revenue. Other IP observers confirm that some right holders rent out their powers of attorney to raid teams that enforce on their behalf. These teams then conduct raids in cooperation with police, but rather than seize infringing product simply demand cash on the spot. Judges have bridled at the use of their warrants for what they see as little more than

extortion. (Note: U.S. music and motion picture companies have long pledged not to settle retail hard goods piracy cases and push for criminal sentences in all cases.) The court has become more reluctant to issue search warrants, partly in reaction to the above practice, but also in the belief that industry should take cases through the civil, rather than criminal system. While industry says they usually receive the warrants after several attempts, they frequently arrive too late to execute the planned enforcement action.

¶14. (SBU) A new case management system in the IP court has also slowed down civil cases. Although a rights holder can obtain a preliminary injunction against a pirate operator, the case will likely not be heard until the following year. However, the court has taken action to reduce the rapid turnover of judges, who typically stayed for only one year and were unable to build up sufficient case knowledge. Judges are now able to stay in position for two to three years and move up within the court.

Compulsory licenses continued in 2007, policy faces review

¶15. (SBU) Thailand issued compulsory licenses in late 2006 and early 2007, breaking the patents on three pharmaceutical products registered in Thailand. Thai health authorities said their actions were legal under WTO rules, but pharmaceutical industry representatives complained vociferously about not only the patent breaking but what they saw as the lack of transparency in the RTG's decision making process and its unwillingness to discuss the matter with company representatives before issuing the licenses. After issuing the licenses, officials from Thailand's Ministry of Public Health (MoPH) opened up discussions with representatives of the companies to negotiate price reductions and improve access to their medicines. However, Ministry officials stuck to their initial demand that companies lower their prices to within five percent of the generic price, and did not yield from that position. No agreements were reached. Several times during 2007 the MoPH imported a generic version of the patented antiretroviral efavirenz under the compulsory license. The Ministry also announced plans to import generic versions of the other two compulsorily licensed drugs, Kaletra from Abbott and Plavix from Sanofi-Aventis, but as yet no generic copies of those two drugs have been sighted in Thailand.

¶16. (SBU) In the latter half of 2007 the MoPH notified three European pharmaceutical manufacturers that it was considering compulsory licenses on four additional cancer drugs and invited the companies for discussions before making its decision. Little progress was made and in January 2008 the Minister of Public Health announced he had signed compulsory licenses on all four drugs. However, the Ministry stated that it would not exercise the compulsory license on Novartis' Imatinib as the company had agreed to expand its access program, but left open the option to use the license at a later date if access was impaired.

¶17. (SBU) In February 2008 a new elected government was sworn in to replace the former coup-installed government that had held office for 16 months. In one of his first acts, new Minister of Public Health Chaiya Sasomsab declared that the new administration would review the compulsory license policy and determine whether the licenses had been properly issued. A review involving officials from the Ministries of Foreign Affairs, Commerce and Public Health is underway, though the officials are focusing only on the most recent round of compulsory licenses rather than the initial three issued in late 2006 and early 2007.

¶18. (SBU) The politics surrounding the compulsory licensing situation have made it difficult for industry to get any traction in dealing with the significant counterfeit pharmaceutical problem in Thailand. Industry reports that counterfeiting of erectile dysfunction drugs is near 100 percent in certain tourist-oriented locations, but this is only a small part of the problem. More troubling is a range of counterfeit medicines meant for diseases endemic in developing countries, such as infections, hepatitis and malaria. The RTG acknowledges the problem, but is ill-equipped to work through the chain of sellers and suppliers of fake drugs. On February 14, DIP signed an MOU with industry, the police, DSI, and Customs, to increase efforts to combat counterfeit pharmaceuticals.

DIP pointed to this effort as a clear indication that Thailand should be removed from the Special 301 Priority Watch List. Noticeably absent from the signing ceremony was the Food and Drug Administration (FDA) which has enforcement authority over pharmacies. The FDA reportedly refused to sign the MOU because the definition of "counterfeit" might include locally-produced generic drugs that violate patents still in effect in Thailand.

Internet piracy a looming threat

¶19. (SBU) Movie and music representatives do not consider internet piracy to have a dramatic effect on their businesses, but recognize that with growing Internet penetration and faster broadband it may soon pose a threat. An estimated 13 million Thais have access to the Internet, approximately 20 percent of the population. Over half a million of those have broadband quick enough to download music, though movie downloading remains too slow to warrant much activity. Internet service providers say they act on rights holders complaints and take down infringing sites upon request. Rights holders claim that a number of pirate outfits selling counterfeit apparel and handbags via the Internet are based in Thailand, though the websites are typically hosted outside the country and are difficult to trace.

Comment and Recommendation

¶20. (SBU) Embassy recommends that Thailand remain on the Priority Watch List until we have seen more serious measures taken against IP violations and a visible decline in piracy. The active enthusiasm of General Visut and his ECOTEC unit was a welcome development in 2007 and must be recognized as a positive step in improving IPR enforcement in Thailand. However, he and his small team are insufficient to root out an entrenched network of pirate manufacturing and retailing, or change a culture of permissiveness to piracy and counterfeiting.

¶21. (SBU) The RTG continues work on improving its legal code to clear obstacles from better police enforcement. But, more significantly, to begin a serious eradication of IP violations, the RTG must summon the political will to demand that its enforcement arms elevate intellectual property piracy as a greater concern and undertake the intensive, sustained effort necessary to clear out networks of pirate manufacturers and retailers. At the end of 2007, national elections ushered in a new government to replace the previous coup-installed government. We are optimistic that the newly-elected Ministers will have a more expansive view toward both domestic and foreign business and will be more open to recognizing the contribution of intellectual property to the development of the Thai economy. Embassy will be working closely with the new economic leadership to encourage a higher priority to developing and protecting intellectual property, and greater diligence in enforcing Thailand's IP laws.

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